

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATTY NICKOLE TESSMER,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2011

No. 297425

Oakland Circuit Court

LC No. 2009-228771-FH

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant, Patty Nickole Tessmer, was convicted by a jury of first-degree home invasion, MCL 750.110a(2), and assault with intent to rob while unarmed, MCL 750.88. Defendant was sentenced as an habitual offender, fourth offense, pursuant to MCL 769.12, to 15 to 50 years' imprisonment for each offense. Defendant now appeals as of right. We affirm.

On appeal, defendant first argues that her due process rights were violated when several jurors saw her in restraints. This Court typically reviews alleged errors regarding the constitutional right to due process de novo; however, because the due process issue is not preserved, this Court will review defendant's claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Carines*, 460 Mich at 763. A criminal defendant has a due process right to be free from shackles during trial. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). However, this general prohibition against shackling does not extend to the transport of a criminal defendant to and from the courtroom. *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008). When jurors inadvertently see a defendant in shackles, the defendant must show she was prejudiced in order to obtain relief. *Id.*

Defendant argues that several jurors saw her in restraints, but the record does not support this claim. After a deputy informed the trial court that some members of the jury on their way to lunch may have observed defendant while she was being transported, the trial court questioned the jury to determine whether anyone observed defendant. Only one juror indicated that he saw defendant, and when questioned individually, this juror told the trial court that he did not see defendant in handcuffs, but only saw her back in the elevator. The juror who observed defendant further indicated that he did not discuss his observation of defendant with any of the other jurors,

and that his observation did not affect his deliberation or verdict. The deputy informed the trial court that defendant was not bound at the ankles. This Court has held that a showing of prejudice is required when a jury inadvertently sees a shackled defendant. *People v Moore*, 164 Mich App 378, 385; 417 NW2d 508 (1987), mod 433 Mich 851 (1989). If defendant fails to establish prejudice there is no error requiring reversal. *Id.* In this case, defendant cannot establish that any juror actually saw her shackled. Further, the juror specifically indicated that he was not prejudiced by his observation. Thus, defendant cannot establish prejudice. Defendant's due process rights were not violated, and there is no plain error affecting substantial rights.

Defendant also argues on appeal that her trial counsel was ineffective for failing to object to the "improper shackling" and for failing to request a mistrial. However, defendant does not support these arguments on appeal. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). However, even if defendant had properly presented the argument to this Court, we do not find defense counsel ineffective. In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). Counsel is not obligated to raise frivolous objections or motions. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). There was no improper shackling because defendant was only handcuffed while being transported. Further, a trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). In this case, a mistrial was not warranted; thus, defense counsel was not ineffective for declining to request one. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant also argues that she was denied effective assistance of counsel because trial counsel withdrew her request for an instruction on the lesser offense of larceny in a building. Before the trial began, defense counsel requested a jury instruction on larceny in a building. The trial court informed counsel it would decide whether to give the instruction after hearing all the evidence. After both sides rested, defense counsel withdrew her request for an instruction on larceny in a building, and the trial court instructed the jury on the elements of the charged crimes only. Defendant argues that trial counsel was ineffective because counsel advised defendant not to seek an instruction on the lesser offense of larceny in a building, failed to inform defendant of the possible penalty for the lesser offense and the charged offenses, rejected an offer from the trial court and prosecutor for a lesser offense instruction, and did not advise defendant that she could request lesser offense instructions without counsel's consent. Because there was no evidentiary hearing regarding defendant's ineffective assistance of counsel claim, our review is limited to mistakes apparent on the record. See *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant has not established a factual predicate for any of her ineffective assistance of counsel claims. There is no indication from the record that defense counsel advised defendant not to seek a lesser offense instruction, that counsel failed to inform defendant of the penalties for the offenses, that counsel rejected an offer for a lesser offense instruction without discussing it with defendant, or that counsel did not inform defendant that she could request a lesser

instruction without counsel's consent. Because defendant has failed to establish a factual predicate for her claims, there is no basis to conclude that counsel was ineffective. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). We note that the record indicates that counsel withdrew her request for an instruction on larceny in a building; however, this withdrawal did not constitute ineffective assistance of counsel. An instruction on a lesser offense is proper only if the offense is a necessarily included lesser offense; instruction on a cognate lesser offense is not permitted. *People v Nyx*, 479 Mich 112, 121; 734 NW2d 548 (2007). Larceny in a building is not a necessarily included lesser offense of first-degree home invasion because the crime of larceny in a building requires the commission of a larceny, and first-degree home invasion requires only an intent to commit a felony or larceny. See MCL 750.110a(2); MCL 750.360. Thus, counsel was not ineffective for failing to ask for the instruction because it could not have been properly given and counsel is not required to bring a meritless motion. See *Darden*, 230 Mich App at 605. Accordingly, defendant is not entitled to any relief.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Mark J. Cavanagh  
/s/ Cynthia Diane Stephens